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Supreme Court, U.S.
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No. __-___

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1991

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Respondents,

v.

FRANK FORREST, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In determining whether members of a state regulatory board are public or private actors for purposes of state action antitrust immunity, should the outcome hinge on the subjective intent of the board members?

2. Should the legislatively-authorized actions of state regulatory board members be state action immune when sufficient political and procedural safeguards exist to eliminate any danger that the board members acted in conflict with state policy?

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OPINIONS BELOW

On September 27, 1985, the District Court for the Western District of Washington granted a motion for summary judgment on state action and other grounds brought by defendants Frank Forrest, *et al.* ("Council members").[1] The plaintiff contractors and trade associations ("Contractors") appealed and the Ninth Circuit affirmed at 839 F.2d 547 (9th Cir. 1988).

This Court's decision to grant the Contractors' petition for certiorari, vacate the Ninth Circuit decision and remand the case, is reported at 109 S. Ct. 38 (1988). After briefing, the Ninth Circuit then remanded the case back to the District Court. That opinion is reported at 880 F.2d 247 (9th Cir. 1989) (Appendix C, p. 12a).[2] On remand, the District Court again dismissed the Contractors' action. The unpublished district court order is attached. (App. B, p. 4a). The Contractors again appealed and the Court of Appeals reversed and remanded the case back to the District Court. That opinion is reported at 930 F.2d 736 (9th Cir. 1991). (App. A, p. 1a). The State seeks review of that decision.

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[1]The petitioners in this proceeding are: Frank Forrest; Mac Johnson; Harold Wilson; Lloyd Wilson; Charles Mason; G. David Hutchins; State of Washington; and State of Washington Department of Labor and Industries.

The respondents in this proceeding are: Washington State Electrical Contractors Association, Inc., a Washington non-profit corporation; Collins Electric Co., a Washington corporation; The Dalford Company, a Washington Corporation; PMC, Inc., d.b.a Phoenix Mechanical Contractors, Inc., a Washington corporation; Quality Enterprises, Inc., a Washington corporation; Virgil Fox Plumbing and Heating, Inc., a Washington corporation; Ed Rosendin Electric, Inc., a Washington corporation; Associated Builders and Contractors of Western Washington, Inc., a Washington non-profit corporation, Associated Builders and Contractors, Inland Pacific Chapter, Inc., a Washington non-profit corporation, and The Washington Association of Plumbing-Heating-Cooling Contractors, a Washington non-profit trade association.

[2]References to the attached Appendix hereafter shall be "App. ___, p. ___."

JURISDICTION

The Ninth Circuit entered its opinion on April 15, 1991 (App. A, p. 1a). On June 24, 1991, the Ninth Circuit denied the State's petition for rehearing and suggestion for a rehearing en banc (App. D, p. 14a). The petition for writ of certiorari is timely if filed on or before September 23, 1991. 28 U.S.C. § 1254(1) (1976 & Supp. 1991) confers jurisdiction on this Court to review this case.

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STATEMENT OF THE CASE

This action is a federal treble-damages antitrust action brought by non-union contractors and their trade associations ("Contractors"). The action is part of the Contractors' long-running effort to undercut important Washington State policy in favor of effective regulation of apprentice training. The Contractors seek judicial repeal of regulatory protections currently afforded to apprentices in state-approved training programs. The Contractors have sued the State of Washington, six individuals who at different times have served as appointed members of the statutorily-created Washington State Apprenticeship Training Council ("Council") and the Department of Labor and Industries, the parent agency for the Council.

Throughout the entire history of this eight-year-old case, the primary issue has been whether Council members are entitled to antitrust immunity for the challenged conduct under the *Parker v. Brown* state action doctrine. Petitioner State of Washington ("State") seeks immediate review of a Ninth Circuit determination that Council members are entitled to antitrust immunity only if they satisfy the state action test for private actors set forth in *Patrick v. Burget*, 486 U.S. 94, 100 (1988). *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (App. A, p. 3a). Unless overturned, the Ninth Circuit decision will undermine essential antitrust protections for trade and professional regulatory boards in the Ninth Circuit and the rest of the nation.

A. State Apprenticeship Regulation

Since 1941, the State of Washington has extensively regulated apprentice training in an effort to promote training in the skilled trades such as carpentry, plumbing and the electrical trade. Before state regulation of apprentice training, young people seeking training and experience in skilled trades were exploited as a source of cheap labor, often at inadequate wages and without any meaningful training or opportunities for advancement. The state regulatory program is designed to establish and maintain standards for apprentice training programs so that the programs are an attractive and rewarding opportunity for people entering the labor force. *See* Wash. Rev. Code § 49.04.050 (1989) (App. F, p. 19a). The state legislature specifically has designated apprentice wages as an appropriate area for regulation. Wash. Rev. Code § 49.04.050(5) (1989) (App. F, p. 19a).

State approval and regulation of apprenticeship programs is not mandatory; the Contractors are free to establish such programs without state approval. State approval amounts to a form of accreditation for programs meeting or exceeding minimum standards.

State approval confers an important benefit on those whose training programs meet or exceed regulatory standards. The State of Washington has a "little Davis Bacon Act" which provides that, on state and local public works projects, skilled labor must be paid the prevailing journey-level wage. *See generally* Wash. Rev. Code

§§ 39.12.020-.021 (1989) (App. G, p. 20a). Apprentices in approved training programs, however, may be paid less than prevailing journey-level rates, but must be paid at least the prevailing hourly rate for apprentices in that trade. Wash. Rev. Code § 39.12.021 (1989) (App. G, p. 20a).[3] Thus, contractors who employ apprentices from approved training programs can pay such apprentices prevailing apprentice wages rather than the more costly journey-level wage.

The rule challenged by the Contractors, Wash. Admin. Code § 296-04-270(2)(c) (1990) (App. H, p. 21a), was adopted by the Council in furtherance of the state interest to protect against economic exploitation of apprentices on work which was not covered by the state "little Davis Bacon Act." Wash. Rev. Code Ch. 39.12 (1989). The part of the rule about which the Contractors complain establishes a wage standard for apprentices based on prevailing journey-level wages. It requires that apprentice wages in approved programs must be based on a journey-level wage that is no lower than 80 percent of prevailing wages, as determined by the state labor statistician.[4]

This rule ensures that apprentice wages cannot fall below a certain level based on the state-determined prevailing wage for each trade and craft.

The Council and its members do not control or influence prevailing journey-level wages. Indeed, because of the large number of different trades and crafts, it would be virtually

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[3]This provision reads as follows:

Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workers for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey-level worker, and, therefore, shall be paid at the prevailing hourly rate for journey-level workers.

[4]This rule replaces a rule that was in effect when this action was filed. That rule required new programs in an area and craft already served by an apprenticeship program to pay a wage scale identical to or greater than that of the existing program.

impossible for the Council to set actual wage levels for each trade and craft in each section of the state. Instead, the prevailing journey-level wages which form the basis for apprentice wage scales are determined by free market forces in the market for skilled labor.

Historically, such journey-level wages have been competitively negotiated at levels which provide a basis for adequate wages for apprentices. The effect of the rule is to take this competitively-determined, prevailing wage and use it as a basis for establishing minimum apprentice wages for projects not covered by Washington's "little Davis Bacon Act." The rule allows the Contractors to pay apprentice wages that are up to 20 percent lower than prevailing journey-level wages would require.

In this action, the Contractors ask to have their cake and eat it, too. They want the federal courts to repeal the wage regulation so that they will be able to obtain state approval for an apprenticeship program with low wages. State approval without wage protections then will allow the Contractors to pay apprentices low wages on both private and public works, thereby avoiding "little Davis Bacon Act" prevailing wage protections. To guard against this degradation of apprentice training, the challenged rule requires contractors, who enjoy the benefits of state approval when they employ apprentices on public works, to meet wage-standard requirements for apprentices on private works.

The Contractors are legally free to disregard these wage-standard requirements for apprentices on private works. And even if they disregard these requirements, they still are legally free to compete for state and local public works. But they incur a cost disadvantage in competing for public works, *i.e.*, the "little Davis Bacon Act" requirement that they pay journey-level wages to their apprentices.

The State, in short, is merely using its control over public works to provide an incentive for those who would do business with it (and with local governments) to avoid substandard wages for apprentices on private works as well. While the State is displacing competition with a regulatory scheme, that displacement is modest and necessary to promote an important state interest.

B. The Council

By statute, the Council is diverse and evenly-balanced by members with contending interests: three representatives from employer organizations, three representatives from employee organizations, one public member, and two state officials.[5] Wash. Rev. Code § 49.04.010 (1989) (App. F, p. 18a). The employee and employer representatives are citizens that are appointed by, and are subject to immediate removal by, a politically accountable state official, the Director of the Department of Labor and Industries. *Id.* The public member is appointed by the Governor. *Id.* Two full-time state officials serve as *ex officio* members of the Council and attend and observe all Council meetings. *Id.* Under state law, each Council member is treated as a public official and state employee subject to state ethical rules. Ch. 42.18-.22 Wash. Rev. Code (1989).[6]

Pursuant to Wash. Rev. Code § 49.04.010 (1989), the Council establishes standards for apprenticeship agreements in conformity with Washington law. (App. F, p. 18a). That statute specifically authorizes standards for apprentice wages. Wash. Rev. Code § 49.04.050(5) (1989) (App. F, p. 19a). In 1980, the Apprenticeship Council promulgated the rule which, as amended in 1986, is subject to challenge in this action: Wash. Admin. Code § 296-04-270(2)(c) (1990) (App. H, p. 21a).

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[5]Under state law, the Council is a state agency. Attorney General Opinion No. 12 (1989). Council rulemaking, such as the rule adoption challenged here, is subject to the procedural safeguards of the Administrative Procedures Act, Wash. Rev. Code Ch. 34.05, including notice, public comment and hearing, and administrative and judicial review. Wash. Rev. Code §§ 34.05.320, 34.05.325, and 34.05.510-.598. The trial court found, and the contractors concede, that the Council complied in all respects with state law governing Council rulemaking. *Washington State Electrical v. Forrest*, No. C83-626VR, slip op. at 7 (D. Wash. Feb. 1, 1990) (App. B, p. 8a).

[6]*See* Wash. Rev. Code §§ 42.18.130 (1989) (definition of "state employee") and 42.21.020 (1989) (definition of "public employee").

C. The Decisions Below

In 1983, the Washington State Electrical Contractors Association brought this federal treble-damages antitrust action, alleging that certain employee representatives on the Council engaged in illegal price fixing by voting in favor of the rule. The Council members' claim of state action immunity has led this case from the District Court for the Western District of Washington to the Ninth Circuit to the United States Supreme Court, and then back to the Ninth Circuit, back to the District Court, and again to the Ninth Circuit.

Upon remand from the Ninth Circuit for further findings, the most recent trial court decision held that the Council is a state agency for purposes of the state action doctrine. *Washington State Elec. Contr. Assoc. v. Forrest*, No. C83-626VR, slip op. at 9. (W.D. Wash. Feb. 1, 1990) (App. B, p. 9a). After reviewing the entire record, the court held that the Council's challenged actions were within statutory authority and faithful to apprenticeship regulatory policy. *Id.* The trial court further concluded that adequate structural, procedural and political safeguards exist to eliminate the risk of anticompetitive abuse by Council members. *Id.* at 9-10 (App. B, p. 10a). Accordingly, the court held that Council members were state action immune. *Id.* at 10 (App. B, p. 10a).

Based on its thorough review of the record, the trial court entered critical findings of fact, that the Contractors do not contest. *Id.* at 7-9 (App. B, pp. 8a-10a). First of all, the court found that the Council's actions complied in all respects with state procedures for lawful rulemaking. *Id.* at 7, Finding 1 (App. B, p. 8a). Next, the court found that the Council is viewed as a state agency and that Council members are public officers under state law. *Id.* at 8-9, Findings 7-8 (App. B, p. 9a). The court further found that state review of the Council's actions was so extensive, including executive, legislative and judicial review, that there was no danger that the Council members were engaged in a private arrangement

in conflict with state policy.[7] *Id.* at 8-9, Findings 4-10 (App. B, pp. 9a-10a).

On appeal of that decision, the Ninth Circuit reversed and remanded. In a brief *per curiam* decision, the Ninth Circuit Panel ("Panel") overturned the trial court finding that the Council was a state agency, comparing the Council to the Oregon Board of Medical Examiners ("BOME") in *Patrick v. Burget. Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991). The Panel mistakenly observed that the Supreme Court had declared that the BOME was not a government agency for state action purposes. *Id.* at 737. To the contrary, the Court in *Patrick* noted that this issue had not been appealed and was not reached in the decision. *Patrick v. Burget*, 486 U.S. 94, 98 fn.4 (1988), *reh. denied* 487 U.S. 1243 (1988).

The Panel also disregarded the unchallenged findings about the absence of any danger of private arrangements by Council members inconsistent with state policy. Instead, the Panel observed that members of the Council "have their own agenda which may or may not be responsive to state labor policy." *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d at 737 (App. A, p. 3a). The Panel then remanded for further findings and conclusions about the Council's compliance with both prongs of the *Patrick* state action test for private actors. *Id.* at 737. The State of Washington's petition for rehearing with suggestion for rehearing *en banc* was denied. *Washington State Elec. Contr. Assoc. v. Forrest*, No. 90-35302 (9th Cir. filed June 24, 1991) (App. D, p. 14a). The State seeks immediate review by this Court.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Jurisdiction in the District Court for the Western District of Washington is conferred by: 15 U.S.C. §§ 15 and 26, The Clayton Antitrust Act; 28 U.S.C. § 1331, federal question jurisdiction; 28 U.S.C. § 1337, commerce and trade regulation jurisdiction;

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[7]The Contractors' motion for reconsideration was denied by the trial court. That order is attached hereto as Appendix E, p. 16a.

28 U.S.C. § 2201, declaratory judgments; and pendant jurisdiction over state law antitrust claims under ch. 19.86. Wash. Rev. Code.

REASONS FOR GRANTING THE WRIT

I. THE DETERMINATION OF WHETHER MEMBERS OF A STATE REGULATORY BOARD ARE PUBLIC OR PRIVATE ACTORS FOR PURPOSES OF STATE ACTION IMMUNITY SHOULD NOT HINGE ON THE SUBJECTIVE INTENT OF THE BOARD MEMBERS.

The Panel decision is a dangerous departure from established principles of state action immunity. Disregarding an abundance of decisions that characterize immunity claimants as private or public on the basis of objective characteristics, the Panel decision relies exclusively on a purely subjective evaluation of individual Council member's "agenda." *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d at 737. (App. A, p. 3a). The Panel's departure from established principles goes further. After characterizing the Council members as private actors, the Panel then blindly applies the *Patrick v. Burget* supervision test. As a result, even though state law views Council members as public officials and the trial court specifically found no danger of anticompetitive abuse, the decision would require even more. Even when there is no danger of anticompetitive abuse, the Ninth Circuit would deny antitrust immunity unless another state official can override Council actions.

If allowed to stand, the decision will subvert nationally important principles of federalism. The decision will directly interfere with Ninth Circuit states' legitimate regulatory objectives. Antitrust immunity for individual members of dozens of state regulatory boards and commissions located in the Ninth Circuit will become fragile and completely unpredictable. If antitrust immunity is unpredictable, then participation on these boards and commissions will be discouraged and state trade and professional regulation will be seriously weakened. The Panel decision's hostility to state regulatory board immunity conflicts directly with this Court's deference to the role of state governmental decisionmakers in the seminal state action decision, *Parker v. Brown*, 317 U.S. 341

(1943) and the Court's most recent state action decision, *City of Columbia v. Omni Outdoor Advertising*, 59 U.S.L.W. 4259 (U.S. Apr. 2, 1991) (No. 89-1671), 499 U.S. ___, 111 S. Ct. 1344 (1991).

The Panel's confusion occurred because of the current lack of clear Supreme Court precedent on the important public versus private characterization issue. Although this Court has addressed many state action immunity issues in the last decade, it has yet to declare what distinguishes public from private action and correspondingly, how state regulatory agency action should be characterized. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 fn.10 (1985). Because of the lack of clear precedent, the Panel reached an outcome that is both destructive of important state regulatory interests and also unwarranted on the record here. Immediate review by this Court is needed in order to correct this grave error and protect the integrity of state regulatory programs.

A. In Applying A Subjective, Rather Than An Objective Test To Determine Whether The Council Members Are Public Or Private Actors, The Panel Decided An Important Federal Question In Conflict With A Recent Decision Of This Court.

In its most recent state action decision, this Court has unequivocally rejected subjective motives as a relevant factor in state action immunity analysis. *City of Columbia*, 59 U.S.L.W. at 4259. In *City of Columbia*, the Court reiterated the *Parker* holding that "state action is *ipso facto* exempt from the operation of the antitrust laws." *Id.* Significantly, the Court held that this is so "regardless of the State's motives in taking the action." *Id.* at 4263, quoting *Hoover v. Ronwin*, 466 U.S. 558, 579-580 (1984).

In *City of Columbia*, as in this case, the governmental decisionmaking body was sued for adopting a rule that restrained competition. In *City of Columbia*, as here, the plaintiff alleged that

individual decisionmakers, *i.e.*, city council members, had conspired with private parties to restrict competition. *City of Columbia*, 59 U.S.L.W. at 4260.

This Court held that state action immunity applied to Columbia city council members because the council acted under state statutes that authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries. Accordingly, the resulting suppression of competition was the foreseeable result of the clearly articulated state policy authorizing anticompetitive conduct. *City of Columbia*, 59 U.S.L.W. at 4261. In so holding, the Court employed the objective characterization test of *Parker v. Brown*, 317 U.S. 341 (1943) and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

Regarding the subjective motivation test used by the Ninth Circuit here, the Court observed: "This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *City of Columbia*, 59 U.S.L.W. at 4262. The Court pragmatically recognized that governmental decisionmaking is often susceptible to the charge that it is "corrupt" or "not in the public interest." *Id.* Consequently, a subjective motivation test would leave governmental decisionmakers excessively vulnerable to treble-damage antitrust liability for otherwise proper decisions and rules that have some anticompetitive effect.

In contrast, the Ninth Circuit Panel in this case engaged in precisely the same invasion of state governmental process rejected in *Omni*. The Panel disregarded trial court findings to the contrary, and instead made its own *de novo* determination that Council members' motives were suspect: "It is now apparent . . . that the Apprenticeship Council may not qualify as a state agency. The Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy." *Washington State Elec. Contr.*

Assoc. v. Forrest, 930 F.2d 736, 737 (9th Cir. 1991) (App. A, p. 3a).[8]

The Panel's decision that the Apprenticeship Council may not qualify as a state agency, based upon Council members' subjective motivations is clearly in conflict with this Court's recent decision in *City of Columbia v. Omni*. Although *City of Columbia v. Omni* involves a municipality, rather than a state regulatory board, the offensiveness to federalism and impracticality of a subjective test applies with even greater force to a state regulatory board. State legislatures commonly look to people with specialized knowledge and experience to serve on regulatory boards. Board members typically are active in the field subject to regulation. Yet, under the Panel decision approach, the same factors that qualify an individual to serve on a regulatory board also provide the basis for a charge of improper motives or a "private agenda."

If the availability of federal antitrust immunity depends entirely on the ability to prove the absence of improper motives, then qualified people will refuse to serve on regulatory boards. Legitimate state regulatory programs will be undermined and state citizens will be denied the benefits and protections conferred by their legislatures when they adopted the regulatory programs.

The Panel's decision represents a federal judicial intrusion into state regulatory action that is completely at odds with *City of*

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[8]Illustrative of the Panel's departure from prior decisions in this area is its treatment of *Patrick v. Burget*, 486 U.S. 94. The Panel interpreted this Court's decision in *Patrick v. Burget* as holding that the Oregon Board of Medical Examiners failed "to satisfy the Supreme Court that it was a governmental agency sufficiently qualified to engage in anticompetitive activity on behalf of the state to avoid scrutiny of the degree of state control over its activities." *Washington State Elec. Contr. v. Forrest*, 930 F.2d at 737 (App. A, p. 3a). The Panel decision overlooks the fact that the Court did not expect the Oregon Board of Medical Examiners (BOME) to qualify itself as a governmental agency since its status as such was not before the Court. *Patrick v. Burget*, 486 U.S. at 98 n.4 ("Because petitioner has not brought this aspect of the Court of Appeal's decision before us, we express no view as to its correctness.") Ironically, the character of the BOME as a state agency had previously been addressed by the Ninth Circuit in that case. *Patrick v. Burget*, 800 F.2d 1498, 1507 (9th Cir. 1986). The Ninth Circuit found that the BOME is a state agency.

Columbia. Immediate review will allow the Court to correct this dangerous departure from precedent and sound policy.

B. The Panel's Decision Reveals The Need For This Court's Guidance On The Question Of How To Characterize State Regulatory Boards For Purposes Of Applying The State Action Immunity Doctrine.

The majority of circuits follow the objective test of *Parker* and reject the subjective test employed by the Panel.[9] However, the disparate reasoning used in the decisions reveals that there is no clear guidance on the question of how to characterize state regulatory boards for purposes of determining whether state action immunity applies.[10] The characterization question for state

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[9]**First Circuit**: *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9, 13 (1st Cir. 1987) (port authority with governmental attributes is immune when it acts within its authority and consistently with state policy); **Second Circuit**: *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1047 (2nd Cir. 1986) (public urban development corporation with private directors has characteristics of municipality and is immune when acting within its authority and consistently with state policy); **Third Circuit**: *Hancock Industries v. Schaeffer*, 811 F.2d 225, 232 n.4, 234-236 (3rd Cir. 1987) (solid waste authority is a state agency which is immune under state action doctrine regardless of subjective motivation of authority members); **Fifth Circuit**: *Benton, Benton & Benton v. La. Pub. Facil. Auth.*, 897 F.2d 198, 203-4 (5th Cir. 1990) cert. denied 111 S.Ct. 1619 (1991) (public corporation created by the legislature for public purposes and acting within its authority and consistently with state policy is state agency for *Parker* immunity); **Seventh Circuit**: *Fuchs v. Rural Elec. Convenience Co-op*, 858 F.2d 1210, 1216-1218 (7th Cir. 1988) cert. denied 490 U.S. 1020 (1989) (unregulated electric cooperative with public attributes is a hybrid entity subject to a lower level of supervision than purely private actors); **Tenth Circuit**: *Buckley Const. v. Shawnee Civ. & Cultural Dev.*, 933 F.2d 853, 856 (10th Cir. 1991) (civil and cultural development authority qualified for *Parker* immunity and the subjective motivations of the actors involved are not to be considered).

[10]The Ninth Circuit would benefit from guidance on this issue as well. Prior to the Panel's decision, the Ninth Circuit appeared to follow the objective test employed in *Parker*, *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied* 110 S. Ct. 1812 (1990), and appeared to reject the subjective test, *Traweek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990) and

regulatory boards has never been squarely addressed by this Court. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 fn.10 (1985) ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.") In light of the number of state regulatory boards in every state, and the important functions served by the boards, the need for guidance in this area is great. The lower courts would benefit from a decision by this Court that declares that the proper approach is an objective test that examines whether the particular board under scrutiny is subjected to sufficient political and procedural safeguards to ensure fidelity to state regulatory policy. Alternatively, a decision to vacate the Panel decision and remand for further consideration in light of *City of Columbia* would serve to correct the problem created by the decision and indicate the proper approach.

II. THE PATRICK ACTIVE SUPERVISION TEST FOR PURELY PRIVATE ACTORS CLAIMING STATE ACTION IMMUNITY SHOULD NOT BE APPLIED TO POLITICALLY ACCOUNTABLE MEMBERS OF A STATE REGULATORY BOARD.

In the decision below, the Ninth Circuit ruled that the actions of Council members must be reviewed under the strict *Patrick* state supervision test. In so doing, the Panel unjustifiably extended this Court's standard for purely private actors to reach state regulatory board members having all the attributes of public actors. The Panel's confusion on this issue stems from the lack of controlling precedent on the question of how much state supervision is required to ensure that state regulatory board members adhere to state law and policy. The Court has not yet addressed this important national issue.

Under *Patrick*, Council members cannot claim immunity unless their actions can be specifically disapproved and overridden by other state officials. *Patrick v. Burget*, 486 U.S. at 94. The Panel's error in this case stems from its mistaken characterization

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Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988).

of Council members as purely private actors. This mistake is then compounded by the Panel's silent disregard of unchallenged findings about the extent and adequacy of state review of the Council's actions. In unchallenged findings of fact, the trial court found that Council members were subject to such extensive state review that "there is no danger that Council members . . . [acted] in conflict with state . . . policy." *Washington State Elec. Contr. Assoc. v. Forrest, No. C83-626VR, slip op. at 9* (App. B, p. 10a). Despite this determination that Council members acted under close state supervision and presented "no danger" of conflict with state policy, the Ninth Circuit ruled that *Patrick* supervision and override power was necessary for immunity. *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d at 737 (App. A, p. 3a).

The Ninth Circuit holding on this issue needlessly threatens the continued vitality of state regulatory programs implemented through boards and commissions. Like Washington's apprenticeship training regulatory program, most state trade regulation is accomplished through appointed and politically-accountable boards of industry participants. Because of the existence of political and procedural safeguards against private abuse of these boards, state legislatures generally have not put override power in the hands of other officials. At the same time, state statutes typically authorize such boards to impose regulations that restrain competition in order to promote other important state interests. If the Panel decision is upheld, then the absence of *Patrick* state override power potentially will strip trade regulation boards of immunity for anticompetitive regulations. Without the assurance of antitrust immunity for legislatively-authorized actions by board members, the threat of federal antitrust liability will defeat legitimate state regulatory programs.[11]

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[11]In the State of Washington, important regulatory programs are implemented through the following boards and commissions: Medical Disciplinary Board, Wash. Rev. Code § 19.72.040; Higher Education Coordinating Board, Wash. Rev. Code § 28B.80; Board of Accountancy, Wash. Rev. Code § 18.04.035; Board of Pharmacy, Wash. Rev. Code § 18.64.001; State Parks and Recreation Commission Wash. Rev. Code § 43.51.020; Wildlife Commission, Wash. Rev. Code § 77.04.030; and Gambling Commission, Wash. Rev. Code § 9.46.040.

This undesirable consequence of the Panel decision is a direct affront to the federalism principles that are at the heart of the state action immunity doctrine. It also is unwarranted by the need to safeguard against private abuses of public power.

This Court in *Town of Hallie* observed that the supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. In that case this Court held that supervision of municipal actors was unnecessary because there was "little or no danger" that a municipality would be involved in a private anticompetitive arrangement. *Id.* at 47. By contrast, in *Patrick*, this Court imposed a strict state override requirement on private actors, based in part on a presumption that a private party is "acting primarily on . . . its own behalf." *Patrick*, 486 U.S. at 100, quoting *Town of Hallie*, 471 U.S. at 47.

A state override requirement is excessively stringent as applied to state regulatory boards, like the Council. Unlike *Patrick*, in this case comprehensive political and procedural safeguards exist to protect against private arrangements contrary to state policy. Most fundamentally, Council members are subject to removal at the command of a politically-accountable state official, the Director of the Department of Labor and Industries. If the power to override is "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy . . .," then the power to remove errant Council members is another way.

Other significant safeguards exist. Council membership is diverse, including employee and employer group representatives, a public member and state officials. Wash. Rev. Code § 49.04.010 (App. F, p. 18a). Neither employee representatives nor employer representatives have a controlling bloc of votes. This balance of interests prevents domination of Council actions by any single interest group.[12] Council rulemaking is governed by statutory procedures that ensure an open, public process with procedural safeguards and judicial review. *Washington State Elec. Contr.*

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[12]This diversity on the Council is very real and has given rise to sharp, even acrimonious, disagreements about what actions are in the best interests of apprentices and apprenticeship training.

Assoc. v. Forrest, No. C83-626VR, slip op. at 7-8 (App. B, Findings 1 and 6, pp. 8a-9a). Individual Council members are subject to state ethics laws that impose sanctions for ethics violations. *Id.* at 8 (App. B, Finding 7, p. 9a). Another state official, the Supervisor of Apprenticeship, reviews the Council's role in apprenticeship regulation and regularly reports to the Director about the Council's actions. *Id.* (App. B, Findings 4 and 5, p. 9a). Two other state officials monitor Council actions and report to their agency heads. *Id.* (App. B, Finding 6, p. 9a). The state legislature itself has closely reviewed the apprenticeship wage rule challenged in this action and has not altered the Council's authority or composition. *Id.* at 9 (App. B, Finding 9, p. 9a).

These safeguards are more than adequate to ensure Council fidelity to state regulatory policy and to guard against private arrangements in conflict with that policy. The trial court specifically found "no danger of a private arrangement in conflict with state . . . policy." *Id.* at 9 (App. B, Finding 10, p. 10a). Accordingly, the Panel's remand for imposition of a *Patrick* supervision and override requirement is unjustified. The Council members in all respects qualify for state action immunity without the unnecessary addition of *Patrick* scrutiny for private actors.

CONCLUSION

This case presents important national issues of antitrust immunity for state regulatory board members and should be reviewed by the Court. Supreme Court review will clarify standards in this area and will deter a surge of new cases seeking to affix federal antitrust liability to legitimate state trade regulation based on board member motives and lack of *Patrick* override power.

In the alternative, the Court should grant summary reversal and dismiss the action, based on the state action immunity of all defendants.

Further in the alternative, the Court should vacate the decision below and remand the case for reconsideration in light of the recent decision in *City of Columbia v. Omni Outdoor Advertising*.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; COLLINS ELECTRIC CO.; THE DALFORD CO.; PMC, INC., et al.,
Plaintiffs-Appellants,

No. 90-35302

D.C. No.
CV-83-626-R

v.

OPINION

FRANK FORREST; STATE OF WASHINGTON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge,
Presiding

Argued and Submitted
March 14, 1991 - San Francisco, California

Filed April 15, 1991

Before: Alfred T. Goodwin and Robert R. Beezer,
Circuit Judges, and Leland C. Nielsen*,
District Judge

Per Curiam

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*Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

OPINION

PER CURIAM:

This is the second appeal in this attempt to impose antitrust liability upon defendants who, in their official or individual capacities, make and enforce minimum wage rates for apprentices in the performance of electrical contracts within the State of Washington. *See Washington State Electrical Contractors Association v. Forrest*, 839 F.2d 547 (9th Cir. 1988).

The Supreme Court granted certiorari and vacated our judgment affirming the district court and remanded the case for further consideration in light of *Patrick v. Burget*, 486 U.S. 94 (1988). *Washington State Electrical Contractors Association v. Forrest*, 109 S.Ct. 38 (1988).

Pursuant to the remand, the district court again considered the question of limited governmental antitrust immunity and concluded that because the defendants were acting pursuant to the state Apprenticeship Act, Wash. Rev. Code § 49.04.010 et seq., the Washington Apprenticeship Council was a state agency and thus it was not necessary to inquire into the degree of state supervision exercised by the state government over the activities of the Apprenticeship Council. The court then held the activities to be cloaked with antitrust immunity, relying upon our then recent decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989). The plaintiff again appealed, contending that the district court had misunderstood the mandate of this court as well as the teaching of the Supreme Court in *Patrick*.

Our opinion on the first appeal, vacated by the Supreme Court, may have contributed to the misleading of the successor district judge who took over this case after the remand. Our opinion had held that there was adequate state supervision by the director of labor and industries to assure that state policies pursuant to legislative guidelines would be followed. We then said that in light of the high degree of state supervision it was unnecessary to reach the characterization question: Is the Apprenticeship Council a "state agency"? On remand, the trial judge compared this case with the *Oregon State Bar* case, and determined that the Appren-

ticeship Council was indeed a state agency and then felt it unnecessary to reach the question of state supervision.

[1] The terms of our remand, however, asked the court to determine the extent of actual state control over the wage-fixing activity of the Apprenticeship Council. It is now apparent, after further briefing and argument, that the Apprenticeship Council may not qualify as a state agency. The Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy. The Council is more nearly like the Oregon Board of Medical Examiners which failed in *Patrick* to satisfy the Supreme Court that it was a governmental agency sufficiently qualified to engage in anti-competitive activity on behalf of the state to avoid scrutiny of the degree of state control over its activities.

[2] The key language in *Patrick* involves the "rigorous two pronged test" derived from *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the anticompetitive conduct must be actively supervised by the state itself. Only if a private party meets both of these requirements is the anticompetitive conduct fairly attributable to the state for antitrust immunity purposes.

[3] On remand, the district court should make specific findings and conclusions on both prongs of the immunity test most recently set out in *Patrick*.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; a Washington non-profit corporation, et al.

Plaintiffs,

v.

FRANK FORREST, et al.,

Defendants.

NO. C83-626VR

COURT'S OPINION FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL

THIS MATTER comes before the court by remand of the Ninth Circuit Court of Appeals for an entry of findings. Having reviewed the directive, together with all briefs and documents filed by the parties, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

This action involves an antitrust challenge brought by nonunion contractors and their associations ("Contractors") to an apprenticeship training policy established by the Washington State Apprenticeship and Training Council ("Council"). The Contractors initiated this action to obtain judicial repeal of a ten-year-old administrative rule ("wage-parity rule") adopted and enforced by the Council in conjunction with the Washington State Department

of Labor and Industries. At issue here is whether the Council's adoption and enforcement of the wage-parity rule should be protected from antitrust liability by the state action doctrine.

The Council is established by the State of Washington's Apprenticeship Act. RCW § 49.04.010 et seq. The Council consists of seven voting members. The state Director of Labor and Industries appoints six Council members, divided evenly among representatives of employees and employers. The Governor appoints a public member to the Council. In addition, two state officials serve without vote as ex officio members of the Council.

The Act directs the Council to "establish standards for apprenticeship agreements in conformity with the provisions of this chapter," and to "issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter." RCW § 49.040.010. In 1980, the Council promulgated Regulation 296-04-270 (referred to as the "wage-parity rule"). WAC § 296-04-270 (1983). This regulation sets forth certain requirements and establishes standards by which proposed apprenticeship agreements would be evaluated by the Council. Subpart (2) (c) of this regulation creates a framework by which apprenticeship program wages are to be computed for any program seeking Council approval. In essence, the regulation prescribes a minimum wage for apprentices based on prevailing rates set by unions and union members.

The Contractors brought suit, alleging that the Council's drafting of the wage-parity rule was a price-fixing activity designed to further the private interests of unions. Plaintiffs argue that the wage-parity rule forces nonunion contractors to pay union wage rates or risk losing many construction contracts because of the failure of their apprentice programs to be approved by the Council. Because the regulation involves tying the apprentice wages to current union wages, plaintiffs argue that the rates are being set by private parties engaged in collective bargaining, absent independent review by the Council. The state responds that the wage-parity rule is designed to protect apprentices from the wage "exploitation" that characterized apprenticeship throughout history, and is within the authority granted the Council by the state.

On the initial cross-motions for summary judgment, the trial court dismissed the suit on state action grounds. Judge Donald

Voorhees ruled that the wage-parity rule was within the broad grant of authority given by the state legislature to the Council. He further ruled that the Council was a state agency and as such was not subject to the supervision requirement within the state action exemption.

Judge Voorhees determined that there were two prongs to the "state action" exemption: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the state must actively supervise any private anticompetitive conduct. Parker v. Brown, 317 U.S. 341 (1943). The court determined that both prongs were present and that, specifically with regard to the second prong, there was no need for active supervision by the state since the Council was a state agency.

On appeal, the Ninth Circuit affirmed the trial court, finding first that promulgation of the rule was within the Council's authority, and second, that the Council's activities were actively supervised. Washington State Elec. Contr. Assoc. v. Forrest, 839 F.2d 547 (9th Cir. 1988). Because the Ninth Circuit Panel found the existence of "active supervision", it declined to decide whether the Council was a state agency. ("Because we conclude that the Council's activities are actively supervised by the state, it is not necessary to determine whether the Council is a state agency exempt from the active supervision requirement." Id. at 553-54.)

The United States Supreme Court accepted certiorari and vacated the decision below, remanding to the Circuit Court "for further consideration in light of Patrick v. Burget." Washington State Elec. Contr. Assoc. v. Forrest, 109 S.Ct. 38 (1989).

After receiving supplemental briefs in which both sides argued for a decision on the merits, the Ninth Circuit remanded the action to this Court for "findings concerning the existence and scope of state review of the management of the apprenticeship program, following the guidance of the Patrick decision." Wash. State Elec. Contractors Assoc. v. Forrest, 880 F.2d 247 (9th Cir. 1989).

II. ANALYSIS

The Supreme Court decision, Patrick v. Burget, 108 S.Ct. 1658 (1988), is the starting point of this remand. Patrick involved

a surgeon who brought action against a group of physicians who were partners in a private medical clinic, alleging violations of the Sherman Act and interference with prospective economic advantage under Oregon law. The surgeon experienced difficulties in his professional dealings with the clinic's physicians, culminating in the physicians initiating peer-review proceedings to terminate the surgeon's privileges at the town's only hospital. The district court entered a judgment against the clinic physicians, but the Court of Appeals reversed on the ground that the physicians' conduct was immune from antitrust scrutiny under the state action doctrine of Parker v. Brown and its progeny, because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.

The US Supreme Court reversed this decision, finding that the "active supervision" prong of the Parker test had not been satisfied. The Court found no showing that the State Health Division, the State Board of Medical Examiners (BOME), or the state judiciary, reviews or could potentially review private decisions regarding hospital privileges. Active supervision was not found to be met by "the mere presence of state involvement or monitoring...." 108 S.Ct. at 1663. Neither the Health Division nor the state BOME were found to have any authority to make the ultimate decision in the peer-review proceedings.

Plaintiffs argue that the requisite active supervision is absent in this case, and therefore no antitrust exemption should exist. The defendants respond that, 1) active supervision does exist here, and 2) because the Council has been determined to be a state agency, the Ninth Circuit has made the "active supervision" test irrelevant in this case through its decision in Hass v. Oregon State Bar, 883 F.2d 1454 (9th Cir. 1989).

The Ninth Circuit issued its decision in Hass on August 30, 1989, one month after it issued the remand in this case. Hass involved a member of the Oregon State Bar challenging a Bar resolution requiring all active Oregon-based attorneys to purchase primary malpractice insurance from the Bar. The Ninth Circuit Panel held that the resolution was immune from challenge under the Sherman Act by virtue of the state action exemption.

The court addressed the "open question" of whether a state agency must satisfy the active supervision requirement under

Patrick. To reach its conclusion, the court compared the Oregon State Bar to the municipality given state action protection without supervision in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). The Ninth Circuit observed, as in Town of Hallie, that when an actor is a state agency, it is subject to public scrutiny and political oversight where, "there is little or no danger that it is involved in a private... arrangement." Hass, 883 F.2d at 1460 (citing Town of Hallie). The court concluded that, "once it is clear that state authorization exists, there is no need to require the State to supervise actively the ... execution of what is a properly delegated function." Hass at 1461.

The state argues that the Hass decision should control the outcome of this action and obviate the need for inquiry into the Council's active supervision.[13] The court agrees and issues the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

This court has reviewed the record from the original trial court proceedings in this case, as well as the recent submissions by parties, and makes the following findings of fact:

1. The rule challenged in these proceedings, the wage-parity rule, WAC § 296-04-270(2)(c), was adopted by the Washington State Apprenticeship and Training Council ("Council") in 1980 in a lawful manner in full compliance with state procedures for rule-making agencies.

2. The wage-parity rule was designed in furtherance of a clearly articulated and affirmatively expressed state policy. RCW § 49.04.010 et seq.

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[13]Plaintiffs contend that a finding by this court of state agency status for the Council is beyond the scope of the Ninth Circuit's remand. The court does not agree with this assertion. The court was broadly instructed to make findings concerning the existence and scope of state review of the management of the apprenticeship program, following the guidance of the Patrick decision. The Ninth Circuit expressly evaluated the Hass case with an eye toward the requirements of the Patrick decision. The Hass rule on state agency exemption from an "active supervision" evaluation is current law in this Circuit. This court's conclusion that the Council is a state agency is directly based on its review of the "existence and scope of state review of the management of the apprenticeship program."

3. Each of the defendant Council members was properly appointed by the Director of the Department of Labor & Industries ("Director") in compliance with the statutory requirement that Council membership be evenly balanced with three employee and three employer representatives. RCW § 49.04.010.

4. Each of the defendant Council members serves at the pleasure of, and is subject to removal by, the Director. Through his or her appointed subordinate, the Supervisor of Apprenticeship ("Supervisor"), the Director regularly reviews the activities of the Council, including the adoption and enforcement of the wage-parity rule. The Council is required to submit a report of its activities to the Director on at least an annual basis. Id.

5. The Supervisor effectively reviews the Council's management of the apprenticeship program. He or she is responsible for ensuring compliance with statutory standards for apprenticeship agreements. RCW § 49.04.030.

6. Council actions are closely monitored by the two ex officio members of the Council, who attend all meetings and report on Council actions to their agency heads.

7. The Council's actions are subject to review by the state judiciary. Council decisionmaking, including rulemaking, is subject to the procedural safeguards of the state Administrative Procedures Act, RCW § 34.04, including notice, public comment, hearing and administrative and judicial review. See, RCW §§ 34.04.025, 34.04.070, 34.04.140. Each Council member is considered under state law to be a "public official" and "state employee," and thereby subject to ethical rules for public officials and employees, and legal sanctions for violations. See, RCW §§ 42.18 through 42.22.

8. The Council is a state agency under state law. See AGO 1989 No.12; September 26, 1985 Summary Judgment Order, C83-626V.

9. The state legislature reviews Council rules and activities for adherence to legislative intent. In the past, the legislature has extensively reviewed the wage-parity rule and related issues without significantly altering the Council's statutory authority or indicating dissatisfaction with the Council's actions by statutory changes or otherwise. The Joint Administrative Rules Review Committee of the current legislature is actively reviewing the wage-parity rule to determine its fidelity with legislative intent.

10. In light of the significant existence and extensive scope of state review of the Council's actions, including the adoption and enforcement of the wage-parity rule, there is no danger that Council members are engaged in a private arrangement in conflict with state apprenticeship policy.

IV. CONCLUSIONS OF LAW

1. The Ninth Circuit has not heretofore ruled on the question of the Council's state agency status. For purposes of the state action doctrine, the Council is a state agency, established by the legislature to regulate apprentice training in the State of Washington.

2. The adoption and enforcement of the wage-parity rule is within the statutory authority of the Council and is consistent with the state's clearly articulated and affirmatively expressed apprenticeship regulatory policy.

3. Adequate structural, procedural and political safeguards exist to ensure that the Council and its members are not pursuing interests other than those of the state.

4. The extent and scope of these safeguards leave no doubt that the Council is a public body, akin to a municipality for purposes of the state action exemption. As such, the Council's actions satisfy the concerns raised by the Ninth Circuit in Hass v. Oregon State Bar.

5. The Council and its members therefore are immune from antitrust scrutiny without further inquiry into active state review or supervision.

6. Defendants State of Washington and Department of Labor and Industries constitute the state in its sovereign capacity and a state agency, respectively, and both therefore are exempt from antitrust scrutiny under the state action doctrine for the actions alleged here.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS: Because all defendants are exempt from antitrust scrutiny for the conduct alleged in this action, the action should be DISMISSED with prejudice.

DATED in Seattle, Washington, this 1st day of February, 1990.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,
Plaintiffs-Appellants,

v.

FRANK FORREST, et al.,
Defendants-Appellees.

No. 85-4232

D.C. No.
CV 83-626-V

ORDER

On Remand from the United States Supreme Court

Filed July 25, 1989

Before: Alfred T. Goodwin, Chief Circuit Judge,
Robert R. Beezer, Circuit Judge, and Leland C. Nielsen,
District Judge

ORDER

Pursuant to the Supreme Court order remanding this case for reconsideration in light of *Patrick v. Burget*, 108 S. Ct. 1658 (1988), *reversing* 800 F.2d 1498 (9th Cir. 1986), this cause is REMANDED to the United States District Court for the Western District of Washington. Upon reconsideration the District Court shall enter findings concerning the existence and scope of state

review of the management of the apprenticeship program, following the guidance of the *Patrick* decision.

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*The Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; COLLINS ELECTRIC CO.; THE DALFORD CO.; PMC, INC., et al.,

Plaintiffs-Appellants,

v.

FRANK FORREST; STATE OF WASHINGTON, et al.,

Defendants-Appellees.

No. 90-35302

D.C. No. CV-83-626-R

ORDER

Before: GOODWIN and BEEZER, Circuit Judges and NIELSEN*, District Judge.

The Panel has voted unanimously to deny the petition for rehearing. Judge Beezer has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Nielsen so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; a Washington non-profit corporation, et al.

Plaintiffs,

v.

FRANK FORREST, et al.,

Defendants.

NO. C83-626VR

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

THIS MATTER comes before the court on plaintiffs' motion for reconsideration of the order dismissing plaintiffs' case with prejudice. Having reviewed the motion, together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

This suit involves an antitrust challenge by plaintiffs to Washington's apprenticeship training policy, implemented by the Washington State Apprenticeship and Training Council ("Council"). After a long journey to the U.S. Supreme Court and back, the case was remanded to this court from the Ninth Circuit Court of Appeals for an entry of findings as to the "existence and scope of state review of the management of the apprenticeship program, following the guidance of the Patrick decision." On February 2, 1990, this court entered Findings of Fact, Conclusions of Law, and Order of Dismissal, in which it found that the Council was a state agency and therefore was immune from antitrust scrutiny without further inquiry in to active state review or supervision. The court then dismissed plaintiffs' claims. Plaintiff now seeks a reconsidera-

tion of that dismissal, and additionally requests that further alternate findings be made as to "active supervision" of the Council. Defendants oppose both the motion for reconsideration and the request for additional findings.

Plaintiffs' first argument is that the court's finding of state agency status and immunity from antitrust scrutiny was improper and beyond the scope of the Ninth Circuit remand order. This court rejects plaintiffs' contention and finds its determination of the Council's status to be consistent with the remand order's mandate. The Ninth Circuit decision in Hass v. Oregon State Bar, 883 F.2d 1454 (9th Cir. 1989) remains the law in this district, and the court finds nothing in plaintiffs' memorandum to persuade it that Hass should not be followed in this situation.

Plaintiffs' second argument is that a further entry of findings by this court regarding the "active state supervision" analysis is desirable in the interest of judicial economy. The court does not find it necessary to make alternative findings on that issue in light of its previous determination of the Council's antitrust immunity.

THEREFORE, plaintiffs' motion for reconsideration is DENIED.

DATED in Seattle, Washington, this 14th day of March, 1990.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

49.04.010 Apprenticeship Council created--Composition--Terms--Compensation--Duties. The director of labor and industries shall appoint an apprenticeship council, composed of three representatives each from employer and employee organizations, respectively. The terms of office of the members of the apprenticeship council first appointed by the director of labor and industries shall be as follows: One representative each of employers and employees shall be appointed for one year, two years, and three years, respectively. Thereafter, each member shall be appointed for a term of three years. The governor shall appoint a public member to the apprenticeship council for a three-year term. The appointment of the public member is subject to confirmation by the senate. Each member shall hold office until his successor is appointed and has qualified and any vacancy shall be filled by appointment for the unexpired portion of the term. The state official who has been designated by the commission for vocational education as being in charge of trade and industrial education and the state official who has immediate charge of the state public employment service shall ex officio be members of said council, without vote. Each member of the council, not otherwise compensated by public moneys, shall be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060 and shall be compensated in accordance with RCW 43.03.240. The apprenticeship council with the consent of employee and employer groups shall: (1) Establish standards for apprenticeship agreements in conformity with the provisions of this chapter: (2) issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter, including a procedure to resolve an impasse should a tie vote of the council occur; and (3) perform such other duties as are hereinafter imposed. Not less than once a year the apprenticeship council shall make a report to the director of labor and industries of its activities and findings which shall be available to the public.

* * *

49.04.050 Standards for apprenticeship agreements. Standards of apprenticeship agreements are as follows:

(1) A statement of the trade or craft to be taught and the required hours for completion of apprenticeship which shall be not less than two thousand hours of reasonably continuous employment.

(2) A statement of the processes in the trade or craft divisions in which the apprentice is to be taught and the approximate amount of time to be spent at each process.

(3) A statement of the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction which instruction shall be not less than one hundred forty-four hours per year.

(4) A statement of the age of the apprentice which may not be less than sixteen years of age.

(5) A statement of the progressively increasing scale of wages to be paid the apprentice.

(6) Provision for a period of probation during which the apprenticeship council or the supervisor of apprenticeship may terminate an apprenticeship agreement at the request in writing of any party thereto. After the probationary period the apprenticeship council, or the supervisor of apprenticeship, under the procedure approved by the council, shall be empowered to terminate the apprenticeship agreement in accordance with the provisions of such agreement.

(7) Provision that the services of the supervisor and the apprenticeship council may be utilized for consultation regarding the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally or in accordance with the established trade procedure.

(8) Provision that if an employer is unable to fulfill his obligation under the apprenticeship agreement he may transfer such obligation to another employer.

(9) Such additional standards as may be prescribed in accordance with the provisions of this chapter.

APPENDIX G

39.12.021 Prevailing rate to be paid on public works--Apprentice workers. Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any worker for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey level worker, and, therefore, shall be paid at the prevailing hourly rate for journey level workers.

APPENDIX H

WAC 296-04-270 Apprenticeship agreements--Types--Standards-Registration, review, cancellation, reregistration--Certificate of completion. . . . (2) Apprentice agreements shall conform to the following standards: . . . (c) The statement of the progressively increasing scale of wages, RCW 49.04.050(5), shall provide for a set percentage of a specified journeyman wage. In no event shall the specified journeyman wage from which the apprentice's percentages are computed fall below eighty percent of the established prevailing basic wage computed by the industrial statistician of the department of labor and industries pursuant to chapter 39.12 RCW. Where the department of labor and industries has not computed such a prevailing basic wage, the prevailing basic wage for the craft for the area set by the United States Department of Labor pursuant to the Davis-Bacon Act, 40 USC § 276, may be used.